MICHAEL RODAK, JR.,

No. 80-830, 80-831

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID G. BRONNER, THE ADVERTISER COMPANY,
Petitioners,

v.

DAVID H. FULTON AND WILLIAM B. WYATT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether under the circumstances presented a decision of the Alabama Supreme Court reversing a summary judgment for defendants in a libel action is a "final judgment" as contemplated by 28 U.S.C. § 1257(3)?

II. Whether a plaintiff in a defamation action who has had the benefit of no discovery must present clear and convincing evidence of the defendants' state of mind to avoid summary judgment?

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JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court under 28 U.S.C. §1257(3). Respondents respectfully submit that this Court lacks jurisdiction because there has been no "final judgment" by the highest court of a state as required by that section.

STATEMENT OF THE CASE

After reviewing the Petitioner's Statement of the Case, Respondents feel it would benefit the Court to hear their version of the circumstances which bring this matter before it. Plaintiffs/Respondents William B. Wyatt and

David H. Fulton (hereinafter "Respondents") filed separate complaints seeking compensatory and punitive damages against Defendants/Petitioners David G. Bronner (hereinafter "Petitioner Bronner") and the Advertiser Company (hereinafter "Petitioner Advertiser") on June 19, 1979. Both Petitioners filed motions to dismiss as to each complaint raising numerous grounds. On July 24, 1979, Petitioners moved to consolidate the Respondents' cases with those of several individuals who are no longer parties to this litigation.

Petitioners filed a motion for protective order and for stay of discovery on the grounds that the pendency of certain federal court actions filed by Respondents raised serious questions of jurisdiction and discovery should, therefore, be stayed until the trial court ruled on Petitioner's motions to dismiss. Although no written order was entered, the trial court orally informed Respondents' counsel that Petitioners' motion was well taken and that discovery would be stayed until the court determined whether these actions could proceed in Circuit Court. At the time summary judgment was granted by the trial court no discovery of any type had taken place.

On August 7, 1979, the Petitioners' motion to consolidate was granted, motions to dismiss on the grounds of the pendency of similar actions in Federal Court were denied and a hearing was set on the remaining grounds of the motions to dismiss. Petitioners filed the affidavit of David G. Bronner in support of their motions. Respondents filed affidavits in opposition and a motion to strike pursuant to Rule 56(e), Alabama Rules of Civil Procedure.

After extensive argument by all parties, the Circuit Court granted summary judgment in favor of both Petitioners after partially granting Plaintiffs' motion to strike.[1] In its order of October 30, 1979, the court ruled that Petitioner Bronner's statements were qualifiedly privileged and that there was no evidence in the record to indicate actual malice. The Court further held that Petitioner Advertiser's account of the press conference was fair and that Petitioner Bronner's privilege protected it as well. The trial court did not reach the question of whether Respondents were public officials or public figures so that the *New York Times v. Sullivan*[2] actual malice standard would apply.

On appeal the Alabama Supreme Court correctly found a genuine issue of material fact, reversed the summary judgments entered by the trial court and remanded the case for trial.[3] The Supreme Court recognized the heavy burden on a party moving for summary judgment and applied the universally accepted principle that the materials lodged must be viewed in the light most favorable to the opposing party. *See Adickes v. Kress & Company*, 398 U.S. 144 (1970).

The circumstances which form the basis for Respondents' actions for defamation are essentially undisputed. After his appointment as Finance Director, Petitioner

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[1] The Bronner affidavit excluding the portions stricken by the trial court appears as Appendix C to the Petition for Writ of Certiorari.

[2] 376 U.S. 254 (1964).

[3] The opinion of the Alabama Supreme Court is set out in full in Appendix B to the Petition for Writ of Certiorari.

Bronner conducted what he termed an "extensive investigation" into alleged wrongdoing of the staff of the Alabama Building Commission. At the conclusion of this investigation, Petitioner Bronner called a news conference at which he issued a written press release and made statements to the assembled members of the press. Four categories of alleged "questionable activities and management" are contained in the press release and appear in the newspaper article:

1. The utilization of state employees on State time to do private business.
2. The discovery of employees on the payroll who provided little or no service to the State.
3. Allowing and/or initiating construction change orders resulting in contractors receiving greater profits.
4. The utilization of gratuities and/or agents in order to secure State business.

According to his affidavit testimony, Petitioner Bronner made additional statements to the members of the press he had assembled. The record is in conflict as to what those oral statements were. Bronner testified he stated that he had made no charges "about anyone . . . they were dismissed because of qualifications and performance." However, Petitioner Advertiser's news article fails to mention that statement at all and implies that the reasons for Respondents' discharge were the "questionable activities and management" set out above.

Respondents by affidavits specifically stated that Petitioner Bronner's accusations of misconduct were false. Respondent Wyatt additionally testified that Bronner had told him his job performance was satisfactory. Of course,

it was impossible for Respondents to offer direct evidence of Petitioner Bronner's state of mind.

The evidence that Petitioner Bronner knew the statements he made were false which precluded summary judgment comes from his own affidavit. He sets out in more than forty numbered paragraphs an extensive litany of allegations of wrongdoing in the Building Commission. However, as the Alabama Supreme Court recognized,[4] nowhere in that affidavit is there any evidence that Respondent Fulton was guilty of any of the four categories of misconduct and there is only minimal evidence that Respondent Wyatt was guilty of one of the four.[5] Hence, the Alabama Supreme Court determined that a material question of fact remained whether Petitioner Bronner knew the statements he made to be false.

The Alabama Supreme Court additionally ruled a material question of fact remained whether or not Petitioner Advertiser had knowledge that the statements in its article were false. Petitioner Bronner's testimony was that he emphasized to the members of the press that the dismissals were because of "qualifications and performance" and that no charges had been made about anyone. Petitioner Advertiser's article not only failed to mention

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[4] Appendix A to Petition for Writ of Certiorari, p. A-11.

[5] The "evidence" referred to in the Bronner affidavit is essentially rumor, speculation and unsupported allegations by individuals who did not receive the favored treatment they felt they deserved before the Building Commission. Of course, Respondents have not had the opportunity to depose these individuals and question them as to their motives. The relevant portions of the news article are set out in the Alabama Supreme Court opinion which is contained in Appendix A to the Petition for Writ of Certiorari.

"qualifications and performance" as a reason for dismissal, but was published under the headline "Officials Fired Following Probe." The only possible interpretation of the news article is that Respondents were fired because of the four categories of wrongdoing set out therein.[6]

REASONS FOR DENYING THE WRIT

In *New York Times v. Sullivan*, and its progeny this Court has attempted to strike a balance between two competing policy interests: (1) freedom of speech and of the press as protected by the First Amendment, and (2) the right of individuals to be compensated for the harm inflicted on them by defamatory falsehood. Petitioners seek to have this Court grant certiorari to decide whether a defamation plaintiff must adduce clear and convincing evidence of *Sullivan* malice to escape a summary judgment for defendant.[7] This Court should deny the Petition for Certiorari because: (1) there has been no final judgment as required by 28 U.S.C. § 1257, (2) the current record is inadequate to determine whether the *Sullivan* malice burden should even apply, and (3) Petitioners have shown no violations of rights guaranteed them by the Constitution.

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[6]The relevant portions of Petitioner Advertiser's article are contained in the opinion of the Alabama Supreme Court which is Appendix A to the Petition for Writ of Certiorari.

[7]Petitioners assume the *Sullivan* standard applies to non-media as well as media defendants although this Court has never considered that issue. Because the Petition should be denied regardless Respondents will follow the same assumption although they contend a lesser standard should apply to non-media defendants.

I.

THIS COURT LACKS JURISDICTION OF THE PETITION FOR CERTIORARI

Petitioners seek a review of a decision of the Alabama Supreme Court reversing a summary judgment in their favor and remanding the case for trial. Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1257, which reads as follows:

> *Final judgments* or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the constitution*, treaties or statutes of, or commission held or authority exercised under, the United States.
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> * * *

(emphasis supplied).

The requirement that a state court judgment be final in order to be reviewed by this Court recognizes the inconvenience and cost of piecemeal review of cases, minimizes the intrusion into the state judicial function and avoids the decision of constitutional issues which can be decided on non-constitutional grounds during the course of the litigation. Over the last several decades this court has carved out several exceptions to the so-called "finality

requirement."[8] Petitioners cite *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), for the proposition that the instant case is ripe for review. Petitioners' reliance on that decision is misplaced. In *Tornillo* this Court dealt with the constitutionality of a Florida criminal statute requiring a newspaper who assailed the character of a political candidate to grant that individual space in the paper to reply. After the Miami Herald published an editorial severely critical of Tornillo, a candidate for the state legislature, but refused to print his reply, the candidate brought an action in circuit court pursuant to the statute. The trial court held the "right of reply" statute unconstitutional but on appeal the Florida Supreme Court overturned that decision and remanded the case for trial. This court held the judgment of the Florida Supreme Court "final" under 28 U.S.C. § 1257. The circumstances of *Tornillo* which prompted this court to review it readily distinguish it from the case *sub judice*.

First and foremost, both parties in *Tornillo* agreed this Court had jurisdiction and urged it to decide the question of the constitutionality of the Florida statute. *See* 418 U.S. at 246. Secondly, as both parties recognized, the uncertainty of the constitutional validity of that statute restricted the exercise of First Amendment rights. The case arose during an election year so that delaying a determination of the constitutional issue would have left undecided whether it was necessary for newspapers to

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[8] *See Mills v. Alabama*, 384 U.S. 214 (1966); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

offer a right of reply to candidates and if so under what circumstances. Additionally the newspaper challenged the statute on vagueness grounds claiming it could not determine how and when to comply with the statute even if compliance was required.

No such extenuating circumstances are present in the instant case. Alabama law is clear that individuals and newspapers can be required to compensate the victims of defamatory statements made with knowledge of falsity or with reckless disregard of falsity. That law follows the teaching of this Court in *Times v. Sullivan* and its progeny and balances the interests of freedom of speech and of the press with the right of individuals to redress for defamation.

Since *Tornillo* this Court rendered its decision in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), and discussed in detail the circumstances in which it will review a state court judgment when additional proceedings are anticipated in the state courts. This Court set up four categories of such cases which will be considered "final" for purposes of Supreme Court review. The Court considered *Tornillo* in the fourth of these categories which it described as:

> those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. 420 U.S. at 482-83.

Respondents respectfully submit that the circumstances of the instant case fall outside that category. This Court's determination of the issues Petitioners raise would not preclude further proceedings in this litigation as it did in *Cox* and *Tornillo*. In those cases the petitioners questioned the constitutionality of state statutes which provided plaintiffs with state law causes of action. A determination that the statutes on which Plaintiffs relied for recovery were unconstitutional necessarily ended the litigation. In the instant case Petitioners claim that their First Amendment rights were violated by the application of a state procedural rule which precluded summary judgment in their favor. Even if the Court agreed with the Petitioners' contention the case must be remanded to state court to determine if summary judgment was proper under whatever evidentiary standard this Court imposed.[9] In addition, before Petitioners argument has any validity, a determination must be made whether these Respondents are public officials, public figures or private individuals. That determination is impossible without further proceedings below.

The fact that this Court's decision will not end this litigation makes the policy considerations discussed above weigh heavily against this Court granting the Petition. In order to avoid piecemeal adjudication of the case this Court should avoid determining the weight of evidence which a public official or public figure must adduce to avoid summary judgment until enough facts are before the court below to allow a determination whether these

[9] Indeed as Respondents argued in brief to the Alabama Supreme Court summary judgment would be inappropriate on this record regardless of the standard required.

Respondents are, in fact, public officials or public figures. A determination, as is very likely, that these Respondents fit neither category would eliminate the necessity of this Court reaching that constitutional issue.

Perhaps more importantly, these Petitioners ask this Court to intercede into a state court civil proceeding and specify the standard of proof which a state court must use in determining a purely procedural issue.[10] There could be no greater interference into the state judicial function. Respondents submit that such an intrusion would rarely, if ever, be warranted. Certainly it is not when further state proceedings could eliminate the need to decide the constitutional question.

II.

THIS CASE IS NOT RIPE FOR REVIEW BY THIS COURT

Even if this Court determines it has jurisdiction pursuant to 28 U.S.C. §1257(3), it should deny the Petition for Certiorari. The state of the record below prevents a well-reasoned determination of any of the constitutional issues Petitioners raise. The decision below was made on a bare-bones record—no answers have been filed by Petitioners and absolutely no discovery has taken place. The

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[10]Petitioners refer the Court to *Brady v. Southern Railway Co.*, 320 U.S. 476, to argue that such intervention is appropriate. *Brady* dealt with the amount of evidence necessary to get to the jury under the Federal Employees Liability Act. This Court held that there must be a uniform national rule as to the amount of evidence necessary under a federal law right to recover. 320 U.S. at 479-80. On the other hand, this Court has recognized that a right of action a state grants its citizens for defamation is a matter left to the states with this Court's role limited to establishing minimal constitutional standards which must be met. *See Gertz v. Robert Welch*, 418 U.S. at 347 (1974).

only material filed by Petitioners to support their respective motions was the self-serving declaration by Petitioner Bronner that his statements were true.[11] Further, there is not sufficient evidence in this record to determine whether Respondents are public figures as that term is defined in the teachings of this Court.

Since its landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has attempted to fashion a rule which assures the vigorous debate of public issues protected by the First Amendment and at the same time affords protection to the reputations of individuals. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*; 399 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 73 (1966). The threshold question in any libel suit is the status of the allegedly defamed plaintiff. If he is a public official[12] or public figure[13] he faces the heavy burden of proving that the defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*. 390 U.S. 727 (1968).

The trial court failed to make the crucial determination of these respondents' status. While that determination is one of law for the trial judge, *Rosenblatt v. Baer*, 383 U.S. 75 (1966), it cannot be made in a vacuum.

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[11] *See St. Amant v. Thompson*, 390 U.S. 727 (1968) where Justice White writing for the majority stated "The defendant . . . cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

[12] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[13] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

> [I]t is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.' " *Rosenblatt, supra,* 383 U.S. at 88.

As this Court has recognized, albeit in dicta, the term "public official" cannot possibly be thought to include all public employees. *Hutchinson v. Proxmire*, 443 U.S. 111, 119 (1979). Rather it includes only those who "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[14] The employees' position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.[15] The current record provides little factual basis for making such a determination as to these Respondents. The evidence which is present favors the determination Respondents are private individuals.

The Bronner affidavit merely states that Respondent Wyatt was Deputy Director of the Technical Staff of the Building Commission and had supervision over its employees.[16] The record does not disclose the number of employees he supervised, the duties they performed or any responsibility Respondent Wyatt exercised which made him the focus of public attention. The sworn testimony of Wyatt, on the other hand, is that the Building Commission was not a visible agency and that he never had been involved in any controversy which

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[14] *Rosenblatt, supra.*

[15] *Id.* at 87, footnote 13.

[16] Petition for Writ of Certiorari, Appendix C, p. A-22.

brought him publicity.[17] From the record below it is impossible to determine that Respondent Wyatt had "substantial responsibility for control over the conduct of governmental affairs."

The only evidence in the record as to Respondent Fulton is merely that he was a building inspector with the State Building Commission and that it was determined too many inspectors had been employed.[18] There is no evidence what the responsibilities of that position are. Fulton's sworn testimony, however, tells us he performed "a great number of inspections on various kinds of public buildings."[19] He also stated that he received no publicity while performing his job. Certainly from this record it cannot be said that Respondent Fulton "had substantial responsibility for control over the conduct of governmental affairs." Indeed there is no evidence he had control over or responsibility over anything other than the low-level position he held.

While Petitioners take the position Respondents are public officials[20] the actual malice burden of *Times v. Sullivan* would also apply if Respondents were deemed public figures. In two very recent cases this Court considered the definition of that term. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 137 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Those cases suggest an individual can obtain the status of public in

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[17]Appendix A, p. 4a.

[18]Bronner affidavit, Petition for Writ of Certiorari Appendix C, p. A-23, A-27.

[19]Appendix B, p. 5a.

[20]Petition for Writ of Certiorari, p. 14.

two ways: (1) by holding a position of persuasive power and influence, or (2) by thrusting himself to the forefront of a public controversy in order to influence the resolution of the issues involved. 443 U.S. S at 134-135, 165. In both cases this Court undertook an in depth factual analysis to determine of the plaintiffs fell within the definition of "public figure." The record in the instant case is devoid of the evidence necessary to make such a determination. The minimal evidence which is present supports the conclusion Respondents were not public figures.

After weighing competing policy interests this Court determined in *Times v. Sullivan*, that in order for a public official to recover damages for defamation he must prove not only that the defamatory statements made were false but that the publisher had actual knowledge of falsity or reckless disregard of the same. Proof that a reasonable man should have known the statements were false is not enough rather "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731. This Court has viewed that question as essentially one of intent and has ruled that a plaintiff is entitled to explore by discovery the subjective state of mind of the Defendant on issues called directly into question by the *Sullivan* standard. *Herbert v. Lando*, 441 U.S. 153 (1979). Evidence of a publisher's intent is by its nature completely within the defendant's possession and available to plaintiff only through discovery.

Respondents in this case have had no opportunity to pursue discovery of any type. At the same time they filed their respective motions to dismiss, Petitioners filed a motion to stay discovery. Respondents had previouslv

propounded lengthy interrogatories to Petitioner Bronner. As a result of the stay of discovery, Respondents were foreclosed from the only available source of evidence needed to meet its burden at trial.

The issue raised by Petitioners is the evidentiary burden on a defamation plaintiff to survive a defendant's summary judgment motion. Petitioners argue that the application of Alabama's scintilla rule has a "chilling effect" on free speech and press. Presumably Petitioners take the position that *Sullivan* requires the application of a clear and convincing test on motion for summary judgment. (*See* Petition For a Writ of Certiorari, p. 7). A discussion of that questionable position requires an exploration of summary judgment law in general.

Since the right to trial by jury is at stake it is universally accepted that the function of a court on motion for summary judgment is to determine whether there are factual issues to be tried and not to dispose of any factual issue.[21] It is elementary that the moving party has the burden of establishing the absence of any genuine factual issue.

In the instant case if the *Sullivan* standard is applicable, the issue involved is without question Petitioners' states of mind at the time the defamatory statements were made. Without the benefit of discovery as to those states of mind, there cannot possibly be a well-reasoned determination of whether Petitioners knew the statements made were false.

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[21] *See* 6 Moore's Federal Practice, paragraph 56.04[1], at 56-66 to -69; Id., paragraph 56.15 [1.8] at 56-391 to 395.

III.

NO CONSTITUTIONAL RIGHTS OF PETITIONERS HAVE BEEN VIOLATED

Petitioners assert that their First Amendment rights have been violated by the application of Alabama's scintilla rule in denying them summary judgment. As Petitioners correctly point out, some sixteen years ago this Court in a landmark decision imposed a heavy burden on a public official who seeks to recover in a defamation action against a newspaper. *New York Times v. Sullivan*, 376 U.S. 254. Since that decision this Court has handed down a number of defamation decisions and applied the *Sullivan* standard to a variety of circumstances.[22] From all of those decisions one principle is clear: the privilege afforded those who comment on public officials or public figures is not absolute. There is no protection afforded publication with knowledge of falsity or reckless disregard for falsity. Neither are defamatory statements concerning private individuals constitutionally protected. These limitations are the result of this Court's recognition of the right of an individual to recover for injury to his reputation.

In asserting denial of their constitutional rights Petitioners content that summary judgment should be preferred in a defamation action. Petitioner, however, can point

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[22] *See, Wolston v. Reader's Digest Association*, 443 U.S. 137 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

to no decision of this Court which supports that contention. To the contrary, the only time this Court discussed that contention it was stated:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not lend itself to summary disposition. (citations omitted).

Some lower courts have embraced the argument that summary judgment should be preferred. Petitioners cite a number of cases for that proposition. A closer analysis of those decisions reveals the inapplicability of that "so-called 'rule" to this case. The cases from the United States Court of Appeals for the Fifth Circuit provide graphic examples. *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969) cert. denied, 395 U.S. 992, is cited by Petitioner. Rather than suggest summary judgment should be preferred where actual malice was at issue the court held:

> Where, however, it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper.

406 F.2d at 570. That decision in no way departs from the traditional standard in determining whether summary judgment is appropriate. More recent cases from the Fifth Circuit which have upheld summary judgments for

libel defendants recognize the necessity of a fully developed record.[23]

In the instant case no discovery has taken place and the record is anything but "fully developed." Even the minimal record which has been made contains sufficient evidence to create a material question of fact whether Petitioners "entertained serious doubts as to the truth" of their publication.

Although urged to do so, this Court has repeatedly refused to grant publishers and broadcasters absolute immunity from liability for defamation. *See New York Times v. Sullivan, supra,* (Black, J. concurring); *Garrison v. Louisiana*, 379 U.S. at 80 (opinion of Douglas, J.); *Curtis Publishing Co. v. Butts*, 388 U.S. at 170 (opinion of Black, J.). By asking that this Court hold that Respondents, without the benefit of any discovery, must produce clear and convincing proof of Petitioners' actual malice to survive a motion for summary judgment, Petitioners seek to overrule years of precedent and grant publisher absolute immunity from liability for defamation statements. Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

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[23] *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 838 (5th Cir. 1970); *Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir. 1979).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV-79-731-T

David H. Fulton,
Plaintiff,

v.

The Advertiser Company, et al.,
Defendants.

Civil Action No. CV-79-729-G

William B. Wyatt,
Plaintiff,

v.

The Advertiser Company, et al.,
Defendants.

AFFIDAVIT OF WILLIAM B. WYATT

Personally appeared before me, the undersigned authority, William B. Wyatt, who, being first duly sworn, deposes and says as follows:

My name is William B. Wyatt. I am a resident citizen of Montgomery County, Alabama, and am Plaintiff in the above-styled cause entitled William B. Wyatt versus The Advertiser Company, et al., now pending in this Court. I was employed by the State Building Commission under and by virtue of Code of Alabama, Section 41-9-141(c). I served as Deputy Director of the Technical Staff of the Commission for several years up until the 29th day of May, 1979. I was dismissed from my employment by the Defendant Bronner, Dr. Wayne Teague, and Representative James Sasser on said date.

I had worked for the Commission for several years prior to said date. I served on the Planning Commission for the City of Montgomery for eight years. I also had a general contractor's license and owned my own construction firm for approximately 15 years. One of the jobs I did was a $1,600,000.00 project at Ft. Rucker, Alabama in 1955-1956.

While serving as an employee of the State Building Commission, I performed my duties and responsibilities in a good and proficient manner. At no time was I disciplined by the Commission, the Chairman, Vice-Chairman, or any other member of the Commission. At no time did I commit my crime or become involved in any criminal activity while serving as an employee of the State Building Commission. I never received any kick-backs or any other illegal payments of money during the entire time that I served the State Building Commission as an employee. I have personally discussed my job performance with the Defendant Bronner prior to my dismissal. At no time did the Defendant Bronner make any accuasation to me or state in any fashion that I had done anything wrong or that I was not performing my job responsibilities in a satisfactory manner. In fact, his statements to me were to the contrary. I had no reason to believe that he was dissatisfied in any fashion with the manner in which I had performed my job responsibilities. I realized that an investigation was being made by the Defendant Bronner prior to my dismissal, but at no time was I informed that any investigation was directed at me. I am personally unaware of any person connected in any fashion with the State Building Commission taking kick-backs or illegal payments from contractors, architects, or any other person or company.

The position I held with the Commission did not require any special training. I have never claimed to be an architect nor a trained engineer. I did, however, have extensive experience in the construction business over the years. At one time I served the City of Montgomery in an official capacity which required expertise in the area of construction.

I am personally acquainted with David H. Fulton, who was employed by the State Building Commission as a building inspector. Mr. Fulton was not hired as the result of any political pressure. Mr. Fulton's hiring was based solely on his own qualifications and experience as a building inspector. I know personally that his job performance with the State Building Commission was quite satisfactory.

I realized for the first time that the Defendant Bronner was charging me with criminal activities when I read the account of his news conference in the Montgomery Advertiser on May 30, 1979. From that day forward, I have received a great deal of contempt, ill-will, and derogatory statements from persons who read the article appearing in The Montgomery Advertiser on said date. A great number of my personal friends have discussed the newspaper article with me and the comments by the Defendant Bronner since the 30th day of May, 1979. All of my friends tell me that the general impression amongst the persons who read the newspaper article was that I had been accused of a crime by the Defendant Bronner.

During the entire time that I was employed by the State Building Commission I never received any publicity of any sort. To my knowledge my name never appeared in any newspaper article or other publication. I did my job in a low-key manner but at the same time effectively.

I never sought publicity and was never involved in any controversy that brought publicity to me. The Building Commission itself was relatively small insofar as employees were concerned during the time I spent with the Commission. We were not a visible state agency at any time during my tenure.

I know for a fact that I am not guilty of any of the accusations made against me by the Defendant Bronner.

I fully realize that this affidavit will be filed by my attorneys in opposition to a motion filed by the Defendants in this cause. All of the above information is based on personal knowledge.

/s/ William B. Wyatt
William B. Wyatt

APPENDIX B

AFFIDAVIT OF DAVID H. FULTON

Personally appeared before me, the undersigned authority, David H. Fulton, who, being first duly sworn, deposes and says as follows:

My name is David H. Fulton. I am a resident citizen of Jefferson County, Alabama. My home is in Bessemer, where I have lived for many years. I am the Plaintiff in the above-styled cause entitled David H. Fulton versus The Advertiser Company, et al., now pending in this Court. I was employed by the State Building Commission as a building inspector under and by virtue of Code of Alabama, Section 41-9-141(c). I served as a building inspector for the Commission from the date of my employment up until the 29th day of May, 1979. I was the dismissed from my employment by the Defendant Bronner, Dr. Wayne Teague, and Representative James Sasser by letter which stated:

> The Personnel and Finance Committee of the State Building Commission, having met this the 29th day of May, 1979, to review the qualifications and performance of Commission employees, you are hereby advised that the Committee has terminated your employment, effective the close of business today.

I had worked for the City of Bessemer for several years as a building inspector, prior to coming to work for the State Building Commission. I had an excellent record with the City of Bessemer and earned much valuable on-the-job experience.

While serving as an employee of the State Building Commission, I performed my duties and responsibilities in a good and proficient manner. I worked hard and did a great number of inspections on various kinds of public

buildings. At not ime was I disciplined by the Commission, or by any individual member of the Commission. At no time did I commit any crime or become involved in any criminal activity while serving as an employee of the State Building Commission. I never received kick-backs or any other illegal payments of money during the entire time that I served the State Building Commission as an employee. I tried to discuss my job performance with the Defendant Bronner after my dismissal, but he refused to see me and turned me over to one of his assistants. I talked with the assistant who told me I was fired solely because I was serving at the pleasure of the Commission. He told me that the Commission had nothing against me and no proof of any wrong-doing on my part. I believe the assistant'a name was John Pappanastos. At no time did the Defendant Bronner make any accuastion to me or state in any fashion that I had done anything wrong or that I was not performing my job in a satisfactory manner. I had no reason to believe that the Commission was dissatisfied in any fashion with the manner in which I had performed my job. I had no knowledge that an investigation was being made by the Defendant Bronner or anybody else prior to my dismissal. At no time prior to my dismissal was I informed that any investigation was directed at me. I have no knowledge of any person employed in any manner with the State Building Commission who took any kick-backs or illegal payments from contractors, architects, or from any other person or company.

I was fully qualified for the position I held with the Commission. I have had extensive experience in the inspecting of buildings during construction over the years.

I am personally acauainted with William B. Wyatt, who was employed by the State Building Commission as the deputy director in charge of the Commission's technical staff. I did not know him prior to November of 1978. I did not get my job through politics, nor did I depend on any politician to secure the job for me. I applied for the job and was hired. I went to work and did my best.

My hiring was based solely on my own qualifications, background, and experience. I know personally that my job performance with the State Building Commission was quite satisfactory.

I realized for the first time that the Defendant Bronner was charging Mr. Wyatt and me with criminal activities when I read the account of his news conference in the edition of the Montgomery Advertiser dated May 30, 1979. From that day forward, I have received a great deal of contempt, ill-will, and derogatory statements from persons who either read the article appearing in the Montgomery Advertiser on said date or heard accounts of the article. A great number of my friends have discussed the newspaper article with me and the comments by the Defendant Bronner since the 30th day of May, 1979. All of my friends tell me that the general impression amongst the persons who read the newspaper article was that I had been accused of a serious crime or crimes by the Defendant Bronner.

There are hundreds of people who will testify to my honesty, good reputation, and good work background.

During the entire time that I was employed by the State Building Commission I never received any publicity of any sort. I never came to Montgomery unless requested to come by my superiors. My name never appeared

in any newspaper article or other publication. I simply did my job in a low-key manner, but at the same time in an effective and professional manner. I never sought publicity and was never involved in any controversy that brought publicity to me. I worked out of Bessemer in an area assigned to me by my superiors.

I know for a fact that I am not guilty of any of the accusations made against me by the Defendant Bronner. I have been unable to obtain employment since my dismissal and based on the response to my requests for employment, it is my opinion that the Defendant Bronner's accusations and the reporting of his news conference by the Montgomery Advertiser and subsequent talk amongst people are the reasons.

I fully realize that this affidavit will be filed by my attorneys in opposition to a motion filed by the Defendants in this cause. All of the above information is based on personal knowledge.

/s/ David H. Fulton
David H. Fulton

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned, a Notary Public in and for said State and said County, hereby certify that William B. Wyatt and David H. Fulton, whose names are signed to the foregoing affidavit, and who are known to me, acknowledged before me on this day that, being informed of the contents of same, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 19th day of September, 1979.

/s/ Judith Ann Head
Notary Public